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Supreme Court Of The United States

OCTOBER TERM, 1978

NO. 78-92

FIRST NATIONAL BANK OF MEMPHIS ..... *Petitioner*

VERSUS

LOUISE CRUM SMITH, ET AL ..... *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1. May a Mississippi Probate Court enter a judgment affecting assets of a domiciliary of the State of Arkansas where the court of domicile has exclusive jurisdiction of the assets?

2. Is an Arkansas Court required to give more credit to a judgment of a Mississippi Court than the judgment of the Mississippi Court would be entitled to under Mississippi law?

RESPONDENTS' STATEMENT OF THE CASE

Respondents herein submit the following additions and corrections to the statement of the case submitted by petitioner in its brief. For a better understanding by this Court of the chronological sequence of events and jurisdiction assumed by the Courts of Mississippi and Arkansas, the proceedings are stated in their chronological order, rather than separating each state's proceedings.

The decedent, Lula S. Torian, age 81, died testate on October 24, 1972, a resident of and domiciled in West Memphis, Arkansas. She was survived by her husband, H. D. Torian. Mrs. Torian's Last Will and Testament, with Codicils thereto, stated that she was a resident of West Memphis, Arkansas. The Torian Will contained no provision governing the apportionment of taxes. The First National Bank of Memphis was appointed executor in accordance with the provisions of Mrs. Torian's will.

The executor petitioned for admission of the original Will to probate in DeSoto County, Mississippi, stating as a basis of jurisdiction for the petition the presence of the nine hundred twenty acres of real estate located in the State of Mississippi. The Will and Codicils were admitted to probate on November 3, 1972. On December 7, 1972, the executor filed an inventory of the estate in Mississippi, which inventory listed personal property located in Mississippi in the total sum of $1,000.00.

On January 23, 1973, the executor filed a petition for admission of the will to probate in the Probate Court of Crittenden County, Arkansas, attaching the order admitting the will to probate in the Chancery Court of DeSoto County, Mississippi. The verified petition of First National Bank of Memphis filed on January 23, 1973, stated that personal

property valued at $486,000 was located in the State of Arkansas. The Order of the Probate Court of Crittenden County, Arkansas, entered the same day, again recited that the $486,000 in personal property was located in the State of Arkansas and that the court had jurisdiction over that personal property.

On May 9, 1973, the executor requested the Probate Court of Crittenden County, Arkansas to postpone the filing of an inventory.

On July 26, 1973, First National Bank of Memphis filed a Petition in the Chancery Court of DeSoto County, Mississippi, seeking to withdraw the original will from its jurisdiction. The respondents, who are the specific and residuary legatees of the Torian Will, answered and joined in the prayer of the petition of the executor for the limited purpose of the petition to withdraw the will.

On August 31, 1973, the devisees of the Mississippi land answered the petition to withdraw the will and filed a cross-bill against First National Bank of Memphis, praying that the Mississippi Court determine the burden of estate taxes. No prayer was made in the cross-bill for a construction of the Torian Will to determine the burden of these taxes, nor was anyone made a party to the cross-bill except First National Bank of Memphis, the executor. The executor, the only named party to the cross-bill, filed an answer in the Chancery Court of DeSoto County, Mississippi. By Final Decree of March 26, 1974, the Chancery Court of DeSoto County, Mississippi dismissed the petition to withdraw the will and construed the will so as to require payment from the residuary estate of all estate taxes and other liabilities and expenses of the estate.

On April 4, 1974, the respondents served notice of their intention to appeal from the decision of the Chancery Court of DeSoto County, Mississippi, filing an appeal bond on May 9, 1974. On November 3, 1975, the Supreme Court of Mississippi affirmed the decision of the Chancery Court of DeSoto County, Mississippi. Recognizing that the executor had been under no compulsion to probate the will in Mississippi and had voluntarily submitted itself to the jurisdiction of the Mississippi Courts, the Mississippi Supreme Court held that the estate taxes should be paid in accordance with Mississippi law. Had the executor offered the original Will for probate in the State of Arkansas and initiated ancillary Mississippi proceedings for muniment of title only, no such conclusion would have been reached by the Court.

In April, 1976, the respondents herein filed a Petition in the Probate Court of Crittenden County, Arkansas, requesting an Order directing the petitioner to file its inventory and final accounting in the Arkansas Court. The executor filed its accounting which indicated the Arkansas estate had approximately $496,626.29, consisting of cash, bonds, securities, etc. The executor claimed credits for those amounts which it had paid for Mississippi, Arkansas, and federal estate taxes. The respondents objected to the accounting, asserting that the executor had not apportioned the tax burden on the Arkansas estate according to Arkansas law. The Probate Court of Crittenden County, Arkansas denied credits totaling $229,114.34, which were claimed by the executor for the disbursements it had made from the Arkansas estate in payment of the estate tax liability on Mississippi assets without the Arkansas Court's approval.

The executor appealed to the Supreme Court of Arkansas from the order of the Probate Court of Crittenden

County denying it credit for the sums expended in payment of the Mississippi estate taxes and federal estate taxes attributable to the Mississippi estate from the Arkansas estate.

On April 24, 1978, the Supreme Court of Arkansas affirmed the Judgment of the Probate Court of Crittenden County, Arkansas, holding that the Mississippi judgment was entitled to full faith and credit as far as it concerned property located in the State of Mississippi, but that it had no effect upon the property legally situated in Arkansas, the domiciliary state of the decedent, over which the Arkansas Courts had previously acquired jurisdiction.

Petitioner now seeks a Writ of Certiorari from this Court, contending that the Arkansas Court was bound to give full faith and credit to a Mississippi Judgment attempting to exercise jurisdiction over property located in the State of Arkansas.

ARGUMENT

I.

THE MISSISSIPPI COURTS HAD NEITHER SUBJECT MATTER NOR IN PERSONAM JURISDICTION OVER THE MATTERS ADJUDICATED BY THE ARKANSAS SUPREME COURT.

Petitioner's entire argument is based upon the ill-founded assumption that the Mississippi court had jurisdiction over the subject matter and the parties. As the record indicates, the Chancery Court of DeSoto County, Mississippi, never had, and never assumed any jurisdiction over the intangible personal property. To the contrary, this property was in the State of Arkansas, was under the jurisdiction of the Probate Court of Crittenden County, Arkansas, as alleged in the executor's Petition for Probate Will and Appointment of Personal Representative dated January 23, 1973. Accordingly, the Mississippi Court had absolutely no jurisdictional basis upon which to adjudicate the burden of taxes to be apportioned against the Arkansas estate.

In order to fully understand the property over which the Mississippi Court had assumed jurisdiction, the time frame of the two administrations is essential. The Petition for Probate of Will and Letters Testamentary (A. 36) was first filed in the Chancery Court of DeSoto County, Mississippi on November 3, 1972. On that same date an Order Probating Will and Issuing Letters Testamentary (A. 39) was signed and entered by the Mississippi Chancery Court. On December 7, 1972, the executor filed an Inventory and Appraisement of Personal Property (A. 46) which only listed "furniture and furnishings located in

DeSoto County, Mississippi," valued in the approximate sum of $1,000.00.

The first time the intangible personal property was brought under the jurisdiction of a court was by the filing of a Petition for Probate of Will and Appointment of Personal Representative (A. 25) filed in the Probate Court of Crittenden County, Arkansas on January 23, 1973, wherein it was stated in Paragraph V (A. 27) and Paragraph VIII (A. 28) of the Petition that "personal property in the approximate amount of $486,000 *is situated in Crittenden County, Arkansas.*" (Emphasis supplied). On the same day, the Order Probating Will and Appointing Personal Representative (A. 31) made a factual finding, "That the assets in the State of Arkansas consist of personal property in the approximate amount of $486,000 and will be administered according to the laws of the State of Arkansas," and was signed and entered in the Probate Court of Crittenden County, Arkansas. The Crittenden County Probate Court had clearly acquired jurisdiction over the intangible personal property legally situated in Arkansas, while the inventory of the personal property in the Mississippi estate reflected no more than the $1,000 in personal belongings located in Mississippi. At this stage of the proceedings, the jurisdictions of the Mississippi and Arkansas Courts over the personal property of the estate had been properly fixed, and no overlapping claims to the property of the estate even existed. The petitioner, *by its own act*, had acknowledged the original jurisdiction of the Arkansas Court and had submitted the personal property to the Court accordingly.

Contrary to the petitioner's repeated assertions, the contents of the lock box (stock certificates, bonds, etc.) were never physically located in the State of Mississippi so

as to give that state jurisdiction of the same. Since Mississippi was neither the situs of the intangible personal property nor the domicile of the decedent, the Mississippi Court did not have jurisdiction over the intangible personalty located in Arkansas. Further, the record of the proceedings in the Chancery Court of DeSoto County, Mississippi reflects that that Court never attempted to assume jurisdiction over the intangible personal property in question, and has still not done so to this day.

Petitioner has asserted that the Arkansas Supreme Court denied full faith and credit to the decision of the Mississippi Supreme Court in refusing to recognize the judgment insofar as it affected property already within the jurisdiction of the Arkansas Court. The general application of the Full Faith and Credit Clause of the United States Constitution is undisputed, but this Court has many times recognized an exception to the general requirement that the judgments of sister states be given full faith and credit when the court rendering such judgment lacked jurisdiction over the person or the subject matter. As this Court so stated in *Williams v. State of North Carolina*, 325 U.S. 231 (1945):

> A judgment in one state is conclusive upon the merits in every other state, but only if the court of the first state had power to pass on the merits — had jurisdiction, that is, to render the judgment. [*Id.* at 228.]

Thus empowered to inquire into the jurisdiction of the Mississippi Court to render its judgment, the Arkansas Court properly concluded that the Mississippi Court was without jurisdiction to decide the question of apportionment of taxes relative to the Arkansas estate. This conclusion of the Arkansas Court was based upon the facts that

an undisputed domiciliary of the State of Arkansas had died owning intangible personal property, and that the Probate Court of Crittenden County, Arkansas had jurisdiction over that intangible personal property by order dated January 23, 1973. The only personal property over which the Mississippi Courts had jurisdiction was the $1,000 in household belongings located in the State of Mississippi. Being properly before the Probate Court of Crittenden County, Arkansas for original administration, no finding of the Mississippi Supreme Court could deprive the Arkansas Courts of their jurisdiction over the intangible personal property of Mrs. Torian.

The administration of an estate is by its very nature an *in rem* proceeding. This Court acknowledged this rule of law in *Kieley v. McGlynn*, 88 U.S. (21 Wall.) 503 (1875):

> . . . the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the Court having jurisdiction. [*Id.* at 509.]
>
> Probate proceedings are in the nature of proceedings *in rem*. [21 C.J.S. Courts, §305 (1940).]

While the Mississippi Court had jurisdiction over the probate proceedings relative to the Mississippi land, it did not have *in rem* jurisdiction over the personal property located in Arkansas and properly under the jurisdiction of the Arkansas Court. As previously stated, the personalty in the Arkansas estate was never under the jurisdiction of the Courts of Mississippi; further the Probate Court of Crittenden County, Arkansas had jurisdiction of the Arkansas

estate and that jurisdiction could not be divested by another court.

In *Issacs v. Hobbs Tie and Timber Co.*, 282 U.S. 734 (1931), this Court held that once a bankruptcy court asserted jurisdiction over a bankrupt's estate, that Court's possession could not be affected by actions brought in other courts, since the title and right to possession of all property owned and possessed by the bankrupt vests in the trustee when the bankruptcy petition is filed. The Court stated:

> This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. [*Id.* at 737-738.]

Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189 (1935) drew an important distinction between concurrent proceedings *in rem* and *in personam*. Where the judgment sought is strictly *in personam*, for money damages or for an injunction compelling or restraining action by the defendant, two courts may proceed simultaneously until a decision is reached in one which may be set up as *res judicata* in the other. However, the Court further held:

> But if the two suits are *in rem* or *quasi in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly

> and disastrous conflicts in the administration of our dual judicial system, (citations omitted), and to protect the judicial process of the court first assuming jurisdiction (citations omitted), the principle, applicable to both federal and state courts, is established that *the court first assuming jurisdiction over the property may maintain and exercise jurisdiction to the exclusion of the other.* [*Id.* at 195 (Emphasis supplied).]

Since the Arkansas courts have previously assumed jurisdiction of the $486,000 in personalty, and the Mississippi court could not and had not done so, the Decree of the Mississippi Court could not have affected the property in the control of the Arkansas Court. This principle has been repeated by this Court on numerous occasions.

In *Mandeville v. Canterbury*, 318 U.S. 47 (1943), in discussing whether a Federal Court could issue an injunction to stay the proceedings of a State Court action, this Court said:

> If two suits pending, one in a state and the other in a federal court, are *in rem* or *quasi in rem*, so that the court or its officer must have possession or control of the property which is the subject matter of the suits in order to proceed with the cause and to grant the relief sought, the court first acquiring jurisdiction or assuming control of such property is entitled to maintain and exercise its jurisdiction to the exclusion of the other. [*Id.* at 48-49.]

Although the Court in *Mandeville* speaks of federal and state courts, the same reasoning is applicable to two state courts of different states. Although not discussed in detail, this principle is recognized in *Markham v. Allen*, 326 U.S.

490 (1945) and *New Haven Inclusion Cases,* 399 U.S. 392 (1970).

Insofar as the Mississippi decree attempted to affect property under the jurisdiction of the Arkansas Courts, it is not entitled to full faith and credit because of lack of jurisdiction over the Arkansas personalty. The result reached by the Arkansas Supreme Court is in accord with sound legal principles, since there is a strong public policy against allowing a court to proceed *in rem* against property already under the jurisdiction of a court of a sister state. *See* RESTATEMENT OF JUDGMENTS, §§7-10 (1942); C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, §3536 (1975).

Petitioner has sought to belittle the impact of this Court's holding in the case of *Carpenter v. Strange,* 141 U.S. 87 (1891), and the significance which its holding has on the facts of this case. In the *Carpenter* case, a New York executrix was held bound by a creditor's judgment rendered in New York against the estate when she took out Letters Testamentary in the State of Tennessee. When the same action had been tried in the State of New York, the New York Supreme Court adjudged a conveyance of Tennessee land to be null and void. When the Supreme Court of Tennessee refused to recognize the declaration by the State of New York that the conveyance was null and void, this Court held:

> To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res.*

* * *

> Direct action upon the real estate was certainly not within the power of the court, and as it did not order Mrs. Strange to take any action with reference to it, and she took none, the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee exclusively subject to its laws and the jurisdiction of its courts. (Citations omitted). [*Id.* at 106.]

As shown by the Order of January 23, 1973, the State of Arkansas, through the Probate Court of Crittenden County, Arkansas had jurisdiction over all personal property of the estate (except some $1,000 in household furnishings and personal effects located in Mississippi). At no time prior to that date had the Mississippi court ever been advised of the existence of such personal property, nor had it ever attempted to assume jurisdiction over the same. Under the holding of *Carpenter v. Strange, supra,* any attempt by the State of Mississippi to compel the respondents to wholly bear the burden of taxes would be to act *in rem* on the property already properly within the exclusive jurisdiction of the Arkansas courts. Hence, the Arkansas Supreme Court was correct in holding that it need not give full faith and credit to that portion of the Mississippi judgment which attempted to act *in rem* upon the property legally situated in the State of Arkansas. (Petitioner's brief, pp. A. 7, A. 8).

The petitioner's argument that the Mississippi court had jurisdiction over the respondents by virtue of their appearance and appeal to the Supreme Court of Mississippi is without merit. The Chancery Court of DeSoto County, Mississippi acquired limited jurisdiction over the respondents herein by virtue of their filing an "Answer to Petition for Permission to Withdraw Original Will" (A. 54) A close inspection of the Answer filed by respondents shows

that they submitted "themselves to the jurisdiction of this Honorable Court *for the purpose of responding to the Petition filed herein.*" (Emphasis supplied) (A. 54) The respondents never waived service of process as to the entire proceedings, but entered their appearance solely for the purpose of the petition to withdraw the will. Mississippi law requires service of process against new defendants on a cross-bill, and the respondents were never made parties to the cross-bill. *See* MISS. CODE ANN., §11-5-37 (1972).

The cross-bill filed in the Chancery Court of DeSoto County, Mississippi did not ask for a construction of the Torian will on the question of apportionment of taxes. In light of the well-established rule of law that construction of the terms of a will is done in accordance with the law of the decedent's domicile, Arkansas law would have applied. Additionally, it is undisputed law that, in order to be bound by a construction of the terms of a will, all who take under the will must be served in order to be bound.

> All persons who have an interest in the subject matter which will be affected by the construction of a will are generally proper and necessary parties to an action therefor. [96 C.J.S., *Wills*, §1088 (1957).]

It has previously been shown that the respondents were never made parties to the cross-bill filed in the Chancery Court of DeSoto County, Mississippi.

In asserting that the respondents were personally bound by the proceedings in the Mississippi courts, petitioner has consistently ignored the fact that the personal property in question was already under the jurisdiction of the Probate Court of Crittenden County, Arkansas. As heretofore stated, this action was entirely consistent with the well-established principle of law that the personalty of a decedent is a unit having its legal situs at the decedent's domicile. *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 404 (1917). Having itself placed the personal property in question under the jurisdiction of the Arkansas courts, it is rather ironic that the Executor now wishes to state that the Mississippi courts have proper jurisdiction over the question of the apportionment of taxes in the Arkansas estate.

In *Carpenter v. Strange, supra,* the judgment that was held binding against a Executor in both states was that of a judgment creditor. This Court held that the judgment rendered in New York was conclusive against the Executrix in Tennessee "because it was a judgment by a court of competent jurisdiction upon the *same subject matter,* between the same parties and for the *same purpose.*" 141 U.S. at 105. (Emphasis supplied). In the case at bar, the subject matter was different, because the Chancery Court of DeSoto County, Mississippi never had jurisdiction over the intangible assets under the jurisdiction of the Probate Court of Crittenden County, Arkansas. Nor were the respondents before the Supreme Court of Mississippi for the same purpose, since that court could only make a finding of the burden of the estate taxes on the property within its jurisdiction, which property consisted of the real estate and personal property (valued in the sum of $1,000) located in DeSoto County, Mississippi.

Respondents have asserted that the Supreme Court of Arkansas misconstrued the holding of *Baker v. Baker, Eccles & Co., supra,* in support of the proposition that the Mississippi judgment could bind the parties *in personam.* The *Baker* case dealt with the application of the Full Faith and Credit Clause to the findings of two states as to the

domicile of a decedent, both states finding that he died domiciled in their forum and that the distribution should be in accordance with its law. In dealing with the question of descent and distribution of personal property, the Supreme Court observed:

> It is the fundamental contention of plaintiff in error that the personal estate of an intestate decedent is a legal unit, having its situs at the owner's domicil; that the title to the whole of it, wherever situate, is vested in the duly qualified domiciliary administrator, and not in the distributees, and that its distribution is governed by the law of the domicil of the deceased owner. Conceding that such is the general rule of law, it is so not because of any provision of the Federal Constitution, but only because the several states, or most of them, have adopted it from the common law into their respective systems. [242 U.S. at p. 400.]

In this case, we have a finding of the Supreme Court of Mississippi that Mrs. Torian died domiciled in the State of Arkansas. There is no question of conflicting findings of domicile, but rather whether the Arkansas Court should be forced to honor the decision of the Mississippi court, when the decision was rendered without jurisdiction over the *res* and its holdings would be contrary to the express public policy of the State of Arkansas regarding the apportionment of taxes. The *Baker* case was properly relied on by the Arkansas Supreme Court in support of the proposition that the personalty had its *legal situs* in Arkansas throughout the course of these proceedings.

Riley v. New York Trust Co., 315 U.S. 343 (1942) dealt with an interpleader action filed in Delaware by the

Coca-Cola Company, in order to determine the respective rights of an Executor (in Georgia) and an Administrator C.T.A. (in New York) to the decedent's stock in the Coca-Cola Company. Both New York and Georgia had previously made findings that the decedent was domiciled in their respective states. This Court held that the State of Delaware, having jurisdiction of the property, had the right to make a judgment as to the domicile of the decedent as it concerned the Delaware property and, on the basis of that finding, delivered the property to the New York Administrator C.T.A. This case sustains the position of the respondents in the case at bar. In so holding, this Court stated:

> A state is interested primarily not in the payment of particular creditors nor in the succession of heirs or beneficiaries, as such, but in the administration of the property of its citizens, wherever located, and that of strangers within its boundaries. In a society where inheritance is an important social concept, the managing of decedent's property is a sovereign right which may not be readily frustrated.
>
> Georgia and New York might each assert its right to administer the estates of its domiciliaries to protect its sovereign interests and Delaware was free to decide for itself which claimant is entitled to receive the portion of Mrs. Hungerford's personalty within Delaware's borders. [*Id.* at 355.]

The Mississippi Supreme Court affirmed the Decree of the Chancery Court of DeSoto County on two grounds. The first ground was its own public policy, and the other was the voluntary act of the First National Bank as Executor in initiating administration proceedings in Mississippi. Public

policy is an expression of the sovereign power of a state. The Mississippi court attempted to impress its sovereign power on a domiciliary of Arkansas and upon property which had its situs in Arkansas and over which Mississippi had no jurisdiction, in derogation of the sovereign power and public policy of Arkansas as clearly expressed in its statutes.

II.

THE ARKANSAS SUPREME COURT GAVE THE SAME FULL FAITH AND CREDIT TO THE MISSISSIPPI DECREE THAT IT WAS ENTITLED TO IN MISSISSIPPI, AS REQUIRED BY ARTICLE 4, SECTION 1 OF THE UNITED STATES CONSTITUTION.

Not only was the Mississippi court without jurisdiction to render a judgment affecting the Arkansas estate, but the laws of the State of Mississippi would hold that the judgment of the Mississippi Supreme Court is not binding upon the Arkansas estate.

> No greater effect can be given to any judgment of a court of one state, in another state, than is given to it in the state where rendered. Any other rule would contravene the policy of the provisions of the constitution and laws of the United States on that subject. (Citation omitted). [*Board of Public Works of Va. v. Columbia College,* 84 U.S. (17 Wall.) 521, 529 (1873).]

In stating that the Mississippi Decree was given the same full faith and credit by the Arkansas court that it was entitled to in the State of Mississippi, a brief analysis of the jurisdictional statute under which the Torian Will was

probated in Mississippi is helpful. Mrs. Torian's Will was offered for probate in the Chancery Court of DeSoto County, Mississippi under the provisions of MISS. CODE ANN. §91-7-33 (1972), which provides:

> Authenticated copies of wills proven according to the laws of any of the states of the union, of the territories, of the District of Columbia, or of any foreign country, and affecting or disposing of property *within this state,* may be admitted to probate in the proper court. Such will may be contested as the original might have been if it had been executed in this state, or the original will may be proven and admitted to record here. (Emphasis supplied).

Prior to 1880, the clause "or the original will may be proven and admitted to record here," was not a part of the Mississippi statute. At that time, the will of a foreign domiciliary had to be first probated in the state of domicile before it could be probated in the State of Mississippi. The administration of a Mississippi will had to be regarded as ancillary to that of the domiciliary administration. The case of *Bolton v. Barnett,* 131 Miss. 802, 95 So. 721 (1923) (discussed in petitioner's brief, page A. 30) discussed the jurisdiction of the Mississippi courts to initiate original probate proceedings of a foreign will. In discussing the statutes which preceded the above cited §91-733, the Court states:

> For many years and perhaps prior to the Code of 1880 this law appeared upon our statutes without the last clause therein. Certainly in Code 1880, §1976, the addition to this section was made, which addition reads as follows and has since been included in our law: "Or

the original will may be proven and admitted to record here." Prior to this amendment our decisions, with some exceptions, treated the probate and administration here as merely auxilliary to that of the domicile of the testator.

In the case of *Bailey v. Osborn*, 33 Miss. 128, the court held that the probate court was without jurisdiction to grant probate of an original will of a person domiciled at the time of his death in a sister state. It was held in that case that the will could only be probated in the first instance in the state of the domicile of the testator. [*Id.* at 821-822, 95 So. at 724.]

In holding that the Mississippi statute, which reads the same now as it did at that time, allowed the original probate of a foreign will, the court was careful to define the limits of its jurisdiction over property. Quoting from *Heard v. Drennon*, 93 Miss. 236, 46 So. 243 (1908), the *Bolton* Court stated:

Insofar as the will itself is concerned, it is treated in all respects as an original will, and all the rights to be derived through the will must be derived from its terms administered according to the law of this state so far as it affects property situated here. [131 Miss. at 824, 95 So. at 725.]

The Court was most emphatic in applying Mississippi law to personal property and its manner of distribution. In ruling on the lower court's order of distribution, the Mississippi Supreme Court stated in *Bolton*:

He erred, however, in not also holding that he was entitled to share equally with the three children in the

personal property. This personal property was situated in Mississippi. It accrued partly from the rents and profits of the real estate and from the other business of the testatrix transacted in Mississippi through her brother, who was her agent. This personal property had always remained in Mississippi in the care and custody of her brother. Its *situs* therefore was here. [131 Miss. at 827, 95 So. at 726.]

The gist of these holdings from the State of Mississippi is clear. Mississippi will apply its own laws to that property which is within its jurisdiction. Under the wording of its jurisdictional statute for probate of foreign wills, as well as its own case law, the personal property is required to be situated *in the State of Mississippi.*

In *Voyles v. Robinson*, 115 Miss. 585, 118 So. 420 (1928) the decedent died in the State of Georgia and an Administrator was appointed for her estate there. She also had property in Mississippi. Claims were filed in Georgia and were allowed and made the judgment of the Georgia Court. Thereafter these judgments were filed as claims against the Mississippi estate. The Mississippi Administrator excepted to the claims and contended that the judgment in Georgia was not binding upon the Mississippi estate. With reference to these foreign judgments, the Mississippi Supreme Court stated:

At page 1124 of volume 24 C.J., it is said that:

"The fact that a claim has been presented and allowed or disallowed in the jurisdiction of the domiciliary administration is no bar to its allowance in the ancillary jurisdiction; and, conversely, an allowance of a claim by a court of one jurisdiction is not conclusive upon a

personal representative in another jurisdiction, or even evidence in such jurisdiction of the debt on which the claim was based."

The same doctrine is announced in 11 R.C.L. p. 431, in the following language:

"Although a domiciliary and ancillary representative are in privity with the decedent, there is no privity between themselves. Hence estoppels in favor of or against one do not bind or affect the other. Each has to do only with the property of the estate within his own jurisdiction, and a judgment against him binds only such property, and will not furnish the basis of a right of action against the other administrator, even when the same person has received letters of administration in each jurisdiction * * * In accordance with these principals the courts hold that a judgment of a court of one state against the administrator of a deceased person, appointed by the courts of that state, which establishes a claim against the decedent's estate, is not even prima facie evidence of the validity of the claim as against lands situated in another state." [*Id.* at 592, 118 So. at 421.]

Two things are clear from the above Mississippi statute and case law, namely (1) that Mississippi only had jurisdiction of property of a foreign domiciliary which had its situs in Mississippi, and (2) that the State of Mississippi would refuse to recognize a judgment of a sister state affecting property within the jurisdiction of the State of Mississippi. The Arkansas Supreme Court held in the same manner by refusing to extend the purview of the Mississippi decision to that property already within the jurisdiction of the

courts in Arkansas. Its action was proper in that it afforded the same full faith and credit as would have been given the judgment in Mississippi.

CONCLUSION

The conclusion reached by the Arkansas Supreme Court was based on the well-established exception to the requirement of the Full Faith and Credit Clause of the United States Constitution, in that the courts of Mississippi wholly lacked jurisdiction over the assets in the Arkansas estate. Due to the *in rem* nature of a probate proceeding, jurisdiction over the *res* was essential to render the judgment conclusive and entitle it to full faith and credit. Arkansas is the only state which had jurisdiction of the $486,000 of intangible personalty in the Torian estate. An attempt by the Mississippi courts to exercise jurisdiction over that personalty is unenforceable and subject to collateral attack in the courts of Arkansas.

Further, the holding of the Mississippi courts need not be given any more credit than it had in its own state. In cases of a foreign domiciliary, Mississippi only grants to its courts jurisdiction over property having its situs in Mississippi. Therefore the Mississippi court was powerless to exercise jurisdiction over the property in the Arkansas estate. Mississippi refuses to recognize the judgments of sister states affecting property having its situs in Mississippi. Consistent with these principles Arkansas should not be required to give greater credit to the Mississippi decree than it is entitled to under the laws of Mississippi.

For the reasons herein stated, respondents would urge that the petition for a Writ of Certiorari be denied by this Honorable Court.

Respectfully submitted,

JOHN R. MCCARROLL, JR.
JOHN S. PORTER
130 North Court
Memphis, Tennessee

and

ELTON A. RIEVES III
200 Shoppingway
West Memphis, Arkansas

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 1978, three copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Ben C. Adams, Frierson M. Graves, Jr. and John C. Speer, 2020 First Tennessee Building, Memphis, Tennessee 38103, counsel for petitioners. I further certify that all parties required to be served have been served.

JOHN R. MCCARROLL, JR.
130 North Court
Memphis, Tennessee

Appendix

IN THE PROBATE COURT OF
CRITTENDEN COUNTY, ARKANSAS

IN THE MATTER OF THE ESTATE OF
LULA B. SULLIVAN TORIAN, DECEASED

NO. 3556

PETITION FOR PROBATE OF WILL AND
APPOINTMENT OF PERSONAL REPRESENTATIVE

Comes First National Bank of Memphis, Memphis, Tennessee, a national banking institution, and petitions for the admission to probate in the State of Arkansas of the Last Will and Testament of Lula B. Sullivan Torian, deceased, and in support thereof, petitioner states to the court as follows:

I.

That the decedent who resided at 1929 McAuley Drive South, West Memphis, Arkansas, died at West Memphis, Arkansas, on October 24, 1972, leaving as her Last Will and Testament a written instrument dated February 7, 1970, a codicil thereto dated March 26, 1970, and another codicil thereto dated January 27, 1971, which have been duly proven in accordance with the laws of the State of Mississippi and filed with the Chancery Court of DeSoto County, Mississippi.

II.

That a duly authenticated copy of said Last Will and Testament and the two codicils thereto of Lula S. Torian,

and Lula B. Sullivan Torian and a second codicil headed Lula B. Sullivan Torian but signed Lula S. Torian are attached hereto as Exhibit "A" and made a part hereof and consists of the following:

(a) Petition for Probate of Will and Letters Testamentary.

(b) Order Probating Will and Issuing Letters Testamentary.

(c) Last Will and Testament of Lula B. Sullivan Torian dated February 17, 1970, and signed Lula S. Torian.

(d) Proof of Will dated November 2, 1972.

(e) Codicil to Last Will and Testament of Mrs. Lula B. Sullivan Torian dated March 26, 1970, and signed Lula B. Sullivan Torian.

(f) Proof of Codicil to Will dated November 2, 1972.

(g) Codicil to Last Will and Testament of Mrs. Lula B. Sullivan Torian dated January 27, 1971, and executed Lula S. Torian.

(h) Proof of Codicil to Will dated November 1, 1972.

(i) Authentication of foregoing instruments signed by H. G. Ferguson, Clerk, Herbert M. Fant, Chancellor, and Certificate of H. G. Ferguson, Clerk.

III.

That Lula S. Torian and Lula B. Sullivan Torian is one and the same person.

IV.

That said instruments are properly certified under the Acts of Congress.

V.

Petitioner further states that original administration is sought in both Mississippi and Arkansas; that the assets in Mississippi will be administered according to the laws of the State of Mississippi and the personal property situated in Crittenden County, Arkansas, will be administered according to the laws of the State of Arkansas; that no real property is owned in Arkansas but personal property in the approximate amount of $486,000.00 is situated in Crittenden County, Arkansas.

VI.

At the time of her death, the said testatrix resided and was domiciled at West Memphis, Arkansas, and executed her said will and codicils thereto on the dates set out above in the State of Mississippi and the same were executed and proven in the manner prescribed by the laws of the State of Mississippi and further were executed and are proven in accordance with the laws of this state.

VII.

That the decedent at the time of her death left personal property in the State of Arkansas and real property in De-Soto County, Mississippi, and it is necessary to probate this will in Arkansas as well as in the State of Mississippi and in order to fully administer the estate upon which administration has heretofore been granted as aforesaid and to make distribution and delivery of the said property to the proper parties and persons.

VIII.

That the probable value of the estate of the decedent in the State of Arkansas is as follows:

Real Property	None
Personal Property	$486,000.00

IX.

That administration on the estate is being had in the State of Mississippi and administration is also sought in the State of Arkansas; that the assets of the estate in Mississippi will be administered according to the laws of the State of Mississippi and the assets in the State of Arkansas will be administered in accordance with the laws of the State of Arkansas.

X.

That the surviving spouse of the decedent is as follows:

H. D. Torian, over 21, husband, 1929 McAuley Drive South, West Memphis, Arkansas 72301

and other next of kin and beneficiaries are as follows:

Ralph Crum
James Crum
Louise Crum Smith
Bates Sullivan
C. H. Sullivan, Jr.
Louise Sullivan Jennings
Virginia Sullivan McDaniels
Frances Sullivan Rice
Mary Charlotte Gibson
John Henry
Roseter Davis
Methodist Children's Home
Methodist Hospital
Dorothy Hope Sullivan
Robert Lamb Sullivan
David Sullivan
Warren Ware Sullivan

XI.

The will of the decedent nominates petitioner, First National Bank of Memphis, Memphis, Tennessee, as executor and it is qualified to serve as such in the State of Arkansas.

XII.

That the will specifically exempts the executor from filing bond and the petitioner is a national banking institution whose deposits are insured by the Federal Deposit Insurance Corporation and which is a member of the Federal Reserve System and as such is not required to furnish bond.

WHEREFORE, petitioner prays that the said will with the codicils thereto of Lula B. Sullivan Torian, deceased, be admitted to probate herein by appropriate order of this court so that the estate may be fully and finally administered and title to the property located within the State of Arkansas may be properly settled and distributed to those entitled thereto and that Letters Testamentary be issued to petitioner so that it may give proper notice to all interested parties and that administration be opened upon said estate in this state.

FIRST NATIONAL BANK OF MEMPHIS,
Memphis, Tennessee, Petitioner

BY SPEARS & SLOAN,
Its Attorneys

By: J. H. Spears
500 East Broadway
West Memphis, Ark. 72301

VERIFICATION

STATE OF ARKANSAS
COUNTY OF CRITTENDEN

J. H. Spears, on oath, states that he is one of the attorneys for the petitioner in the foregoing Petition for Probate of Will and Appointment of Personal Representative and that the matters and things set forth therein are true and correct.

/s/ J. H. Spears

Subscribed and sworn to before me this 22nd day of January, 1973.

/s/ Bobbye Billings

My commission expires:
March 27, 1975

FILED: Jan. 23, 1973.

IN THE PROBATE COURT OF
CRITTENDEN COUNTY, ARKANSAS

IN THE MATTER OF THE ESTATE OF
LULA B. SULLIVAN TORIAN, DECEASED

NO. 3556

ORDER PROBATING WILL AND
APPOINTING PERSONAL REPRESENTATIVE

On this 23rd day of January, 1973, is presented the petition of First National Bank of Memphis, Memphis, Tennessee, for probate of will and appointment of personal representative and it appearing to the court:

That the First National Bank of Memphis, Memphis, Tennessee, is a national banking institution and presents to the court for admission to probate in the State of Arkansas the Last Will and Testament of Lula S. Torian also known as Lula B. Sullivan Torian, deceased, and from the petition, the court finds:

I.

That the decedent was a resident of West Memphis, Crittenden County, Arkansas, residing at 1929 McAuley Drive South; that she died in West Memphis, Crittenden County, Arkansas, on or about the 24th day of October, 1972, leaving as her Last Will and Testament a written instrument dated February 7, 1970; a codicil dated March 26, 1970, and another codicil dated January 27, 1971, all of which have been duly proven in accordance with the laws of the State of Mississippi and filed in the Chancery Court of DeSoto County, Mississippi.

II.

That petitioner attaches to its petition the record from the Chancery Court of DeSoto County, Mississippi, properly certified under the Acts of Congress, the following instruments, to wit:

(a) Petition for Probate of Will and Letters Testamentary.

(b) Order Probating Will and Issuing Letters Testamentary.

(c) Last Will and Testament of Lula B. Sullivan Torian dated February 17, 1970, and signed Lula S. Torian.

(d) Proof of Will dated November 2, 1972.

(e) Codicil to Last Will and Testament of Mrs. Lula B. Sullivan Torian dated March 26, 1970, and signed Lula B. Sullivan Torian.

(f) Proof of Codicil to Will dated November 2, 1972.

(g) Codicil to Last Will and Testament of Mrs. Lula B. Sullivan Torian dated January 27, 1971, and executed Lula S. Torian.

(h) Proof of Codicil to Will dated November 1, 1972.

(i) Authentication of foregoing instruments signed by H. G. Ferguson, Clerk, Herbert M. Fant, Chancellor, and Certificate of H. G. Ferguson, Clerk.

III.

That Lula S. Torian and Lula B. Sullivan Torian is one and the same person.

IV.

That said instruments are properly certified under the Acts of Congress.

V.

That the assets in the State of Arkansas consist of personal property in the approximate amount of $486,000.00 and will be administered according to the laws of the State of Arkansas.

VI.

That the testatrix resided and was domiciled at West Memphis, Arkansas, and executed her will and codicils thereto on the dates set out above in the State of Mississippi and were executed and proven in the manner prescribed by the laws of the State of Mississippi and further were executed and proven in accordance with the laws of this state.

VII.

That the decedent at the time of her death left personal property in the State of Arkansas and real property in DeSoto County, Mississippi, and the court finds that it is necessary to probate this will in Arkansas as well as in the State of Mississippi to fully administer the estate and to make distribution and delivery of said property to the proper parties and persons.

VIII.

That the probable value of the estate of the decedent in the State of Arkansas is as follows:

Real Property	None
Personal Property	$486,000.00

IX.

The court also finds that administration is being had in the State of Mississippi and is being administered according to the laws of the State of Mississippi and the assets in the State of Arkansas will be administered in accordance with the laws of the State of Arkansas.

X.

That the surviving spouse of the decedent is as follows:

H. D. Torian, husband, over 21, 1929 McAuley Drive South, West Memphis, Arkansas

and other next of kin and beneficiaries are as follows:

Ralph Crum
James Crum
Louise Crum Smith
Bates Sullivan
C. H. Sullivan, Jr.
Louise Sullivan Jennings
Virginia Sullivan McDaniels
Frances Sullivan Rice
Mary Charlotte Gibson
John Henry
Roseter Davis
Methodist Children's Home
Methodist Hospital
Dorothy Hope Sullivan
Robert Lamb Sullivan
David Sullivan
Warren Ware Sullivan

XI.

That the will of the decedent nominates petitioner, First National Bank of Memphis, Memphis, Tennessee, executor and the court finds that it is qualified to serve as such in the State of Arkansas.

XII.

That the will specifically exempts the executor from filing bond and the First National Bank of Memphis, Memphis, Tennessee, is a national banking institution whose deposits are insured by the Federal Deposit Insurance Corporation and which is a member of the Federal Reserve System and as such the court finds that it be not required to furnish bond.

IT IS, THEREFORE, BY THE COURT CONSIDERED AND ORDERED that the authenticated copy of the instruments listed in Paragraph II of the petition be filed; that the will provides the executor is relieved of the necessity of filing bond and since the executor is a national banking institution authorized to do business in the State of Arkansas there is no necessity of bond and the clerk of this court shall issue Letters Testamentary to the First National Bank of Memphis, Memphis, Tennessee, without the necessity of bond; that appropriate notices shall be given to the surviving spouse and the next of kin.

/s/ Terry Shell,
Probate Judge

IN THE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI

MRS. LULA S. TORIAN ..... *Testatrix*

VS. NO. 72-497

FIRST NATIONAL BANK OF MEMPHIS ..... *Executor*

PETITION FOR PROBATE OF WILL AND
LETTERS TESTAMENTARY

TO THE HONORABLE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI:

Comes now First National Bank of Memphis, Memphis, Tennessee, a national banking corporation, by its Trust Officer, Edwin M. Standefer, who would show the following:

That Mrs. Lula S. Torian, also known as Mrs. Lula B. Sullivan Torian, died testate on October 24, 1972 in the Crittenden Memorial Hospital, West Memphis, Arkansas, owning real and personal property in DeSoto County. The decedent was a citizen and resident of Crittenden County, Arkansas at the time of her death, but owned no real property in Arkansas. Because decedent owned approximately 900 acres of land in DeSoto County, Mississippi, it is necessary and desirable to probate her Will in DeSoto County, Mississippi where the bulk of her estate is situated.

That Mrs. Torian left an instrument of writing dated February 17, 1970 purporting to be her last Will and Testament and two codicils thereto, the first dated March 26, 1970 and the second dated January 27, 1971.

The instrument purporting to be her Will, dated February 17, 1970, was signed by Lula S. Torian on said

date in the presence of Joel P. Walker and J. O. Thompson as attesting witnesses. The codicil dated March 26, 1970 was signed by Lula B. Sullivan Torian as a codicil to her Will on said date in the presence of Joel P. Walker and Joyce B. Grier as attesting witnesses. The codicil dated January 27, 1971 was signed by Lula S. Torian as a codicil to her Will on said date in the presence of Joel P. Walker and George S. McIngvale as attesting witnesses.

That filed with this Petition are the affidavits of the attesting witnesses to the Will and codicils showing that on the date of the execution of the Will and codicils thereto, each instrument was signed and subscribed by Mrs. Torian in the presence of the witnesses and the witnesses at the special instance and request of Mrs. Torian and in her presence and in the presence of each other, attested the publication thereof and which proof shows that on the date of the execution of the Will and each codicil, that Mrs. Torian was over the age of 21 years, of sound and disposing mind and memory, and in all respects qualified and competent to make and execute the Will or codicil.

That the First National Bank of Memphis, Memphis, Tennessee, was appointed Executor of the Will by the codicil dated March 26, 1970 and was relieved from posting bond and is a suitable, qualified and proper company duly authorized to qualify as Executor of the estate.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Will and codicils thereto, described in the premises, be found, adjudged and declared to be the true last Will and Testament of Lula S. Torian, also known as Mrs. Lula B. Sullivan Torian, and be admitted to probate as such together with proof, and Letters Testamentary issue

to First National Bank of Memphis upon the taking of the oath of office by its Trust Officer, bond having been waived.

Petitioner prays for general relief.

/s/ Joel Walker, Solicitor

STATE OF MISSISSIPPI
COUNTY OF DE SOTO

This day personally appeared before me, the undersigned authority in and for said County and State, the within named Edwin M. Standefer, Trust Officer for First National Bank of Memphis, Memphis, Tennessee, for and on behalf of said Bank, who being by me first duly sworn, says on his oath that the matters and things contained in the above and foregoing Petition are true and correct as therein stated.

/s/ Edwin M. Standefer, Trust Officer
for First National Bank of Memphis,
Affiant

Sworn to and subscribed before me this 3rd day of November, 1972.

H. G. Ferguson, Chancery Clerk of
DeSoto County, Mississippi

FILED: 3rd day of Nov. 1972.
By: /s/ E. Miller, D.C.

IN THE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI

MRS. LULA S. TORIAN ..... *Testatrix*

VS. NO. 72-497

FIRST NATIONAL BANK OF MEMPHIS ..... *Executor*

ORDER PROBATING WILL AND ISSUING
LETTERS TESTAMENTARY

This cause came on to be heard before the undersigned clerk in vacation on the duly verified Petition of the First National Bank of Memphis, Memphis, Tennessee, a national banking corporation, praying for the probate of the last Will and Testament and codicils thereto of Mrs. Lula S. Torian, also known as Mrs. Lula B. Sullivan Torian, and proof, and the clerk having heard the Petition and proof, finds as follows:

That Mrs. Lula S. Torian, also known as Mrs. Lula B. Sullivan Torian, died testate on October 24, 1972 at the Crittenden Memorial Hospital, West Memphis, Arkansas, owning real and personal property in DeSoto County. It appears from the Petition that she owned no real property in the State of Arkansas, but a considerable portion of her estate consists of real property in DeSoto County, Mississippi.

That Mrs. Torian left an instrument of writing dated February 17, 1970 purporting to be her last Will and Testament, and two codicils, the first dated March 26, 1970 and the second dated January 27, 1971.

The instrument dated February 17, 1970 was signed and subscribed by Lula S. Torian on said date in the pres-

ence of Joel P. Walker and J. O. Thompson as attesting witnesses, and the witnesses in the presence of Mrs. Torian, at her special instance and request and in the presence of each other, subscribed said instrument attesting to the publication thereof as the last Will and Testament of Lula S. Torian.

The codicil dated March 26, 1970 was signed and subscribed by Lula B. Sullivan Torian on said date as a codicil to her Will in the presence of Joel P. Walker and Joyce B. Grier as attesting witnesses, and these witnesses in the presence of Mr. Torian, at her special instance and request, and in the presence of each other, subscribed said instrument attesting to the publication thereof as a codicil to the last Will and Testament of Mrs. Torian.

That the codicil dated January 27, 1971 was signed and subscribed by Lula S. Torian as a codicil to her Will on said date in the presence of Joel P. Walker and George S. McIngvale as attesting witnesses, and these witnesses in the presence of Mrs. Torian at her special request, and in the presence of each other, subscribed said instrument attesting to the publication thereof as a codicil to the last Will and Testament of Mrs. Torian.

That filed with the Petition was the Will and two Codicils, together with the proof of the attesting witnesses, showing the due and legal execution of the Will and Codicils, and showing that on the date of the execution of the Will and Codicils, Mrs. Torian was over the age of Twenty-one years, of sound and disposing mind and memory and in all respects qualified and competent to make and execute her Will.

That the codicil dated March 26, 1970 nominates First National Bank of Memphis, Memphis, Tennessee, to be Executor of the Will and relieves the Executor from giving bond, and the Bank is a suitable, proper and qualified corporation to qualify as Executor and through its Trust Officer has taken the proper oath of office.

IT IS THEREFORE, ORDERED ADJUDGED, that the instrument of writing dated February 17, 1970 and the Codicils dated respectively on March 26, 1970 and January 27, 1971, purporting to be the last Will and Testament and Codicils thereto of Mrs. Lula S. Torian, also known as Mrs. Lula B. Sullivan Torian, deceased, are found, adjudged and decreed to be the true last Will and Testament of the decedent and are admitted to probate and ordered recorded as such, together with the proof, and Letters Testamentary will issue to First National Bank of Memphis, it having taken the oath of office and bond having been waived.

ORDERED AND ADJUDGED this 3rd day of November, 1972.

H. G. Ferguson, Chancery Clerk

FILED: 3rd day of Nov 72.
By: /s/ E. Miller, D.C.
Book 36, page 535.

WARRANT OF APPRAISERS

(Sec. 1653-1654-1655-1656 Code of 1930)

ESTATE OF LULA S. TORIAN ..... *Deceased*

THE STATE OF MISSISSIPPI)
DE SOTO COUNTY)

THIS IS TO COMMAND YOU:

First. Before proceedings to act regarding the matters herein, to take the following oath, viz.: "I do swear (or affirm) that I will well and truly, without partiality or prejudice, perform the duties of appraiser of the estate of LULA B. SULLIVAN TORIAN, deceased, as commanded in the warrant of appraisement and according to law, to the best of my skill and judgment."

Second. To jointly inventory and appraise, the goods, chattels, and personal estate, other than money and choses in action, of LULA B. SULLIVAN TORIAN, deceased, located in the County of DE SOTO, so far as the same may be shown to you, or may come to your knowledge, setting down in a column or columns opposite to each article the value thereof in figures, and at the bottom of each column, the contents thereof.

Third. To jointly set apart to the widow and children, or to the widow if there be no children, or to the children if there be no widow, such of the estate as is exempt by law from execution.

Fourth. To jointly set apart for the widow and children, who were being supported by the deceased, or for the widow if there be no children, or for the children if there be no widow, or to the infant children, if the deceased were

their mother, and they were being maintained by her, one year's provisions and necessary wearing apparel including in such provisions so much thereof, as is embraced in the exempt property, set apart to them, or if there be no provisions, or wearing apparel, or an insufficient amount thereof, to allow a sum of money necessary to supply the same for one year.

Fifth. To jointly ascertain and allow what sum of money will be necessary to pay tuition for the children for one year, in case there be any.

Sixth. To jointly report in writing to the Chancery Court of DeSoto County, within thirty days from the date hereof, your inventory and appraisement of said estate, and your allotment of the exempt property, and the allowances made to the widow and children, if any, with your certificate attached, that you took the oath herein as required.

Witness my hand and the official seal this 4th day of December, A.D., 1972.

FIRST NATIONAL BANK OF MEMPHIS, EXECUTOR ESTATE OF LULA S. TORIAN

By: /s/ Edwin M. Standefer,
Vice President & Trust Officer

OATH OF APPRAISERS

I do swear (or affirm) that I will well and truly without partiality or prejudice, perform the duty of appraiser of the estate of LULA B. SULLIVAN TORIAN, deceased, as commanded in the Warrant of Appraisement and according

to law, to the best of my skill and judgment, so HELP ME GOD.

FIRST NATIONAL BANK OF
MEMPHIS, EXECUTOR ESTATE
OF LULA S. TORIAN

By: /s/ Edwin M. Standefer,
Vice President & Trust Officer

STATE OF TENNESSEE)
COUNTY OF SHELBY)

Sworn to and subscribed before me, this 4th day of December, A.D., 1972.

/s/ Mabel Topper, Notary Public

My commission expires:
July 7, 1974

PERSONAL PROPERTY EXEMPT FROM EXECUTION

Sec. 1963, Code of 1892

First. The tools of a mechanic necessary for carrying on his trade.

Second. The agricultural implements of a farmer necessary for two male laborers.

Third. The implements of a laborer necessary in his usual employment.

Fourth. The books of a student required for the completion of his education.

Fifth. The wearing apparel of every person.

Sixth. The libraries of all persons not exceeding two hundred and fifty dollars, in value, also the instruments of surgeons and dentists, used in their profession, not exceeding two hundred and fifty dollars in value.

Seventh. The arms and accoutrements of each person of the enrolled militia of the State.

Eighth. All globes, books and maps used by teachers of schools, academies and colleges.

Ninth. The following property of each head of a family to be selected by the debtor, to-wit:

(a) Two work horses or mules, and one yoke of oxen.
(b) Two cows and calves.
(c) Twenty head of hogs.
(d) Twenty sheep or goats.
(e) All poultry.
(f) All colts under three years old raised in this State by the debtor.
(g) Two hundred and fifty bushels of corn.
(h) Ten bushels of wheat or rice.
(i) Five hundred pounds of pork, bacon, or other meat.
(j) One hundred bushels of cotton seed.
(k) One wagon and one buggy or cart, and one set of harness.
(l) Five hundred bundles of fodder, and one thousand pounds of hay.
(m) Forty gallons of sorghum or molasses.
(n) One thousand stalks of sugar cane.
(o) One sugar mill and equipment, not exceeding one hundred and fifty dollars.
(p) One bridle and saddle, and one side saddle.
(q) One sewing machine.
(r) Household and kitchen furniture not exceeding in value two hundred dollars.

Tenth. And the following property shall be exempt from garnishment or other legal process, to-wit:

(a) The wages of every laborer or person working for wages, being the head of a family, to the amount of one hundred dollars, and every other person to the amount of twenty dollars.
(b) The proceeds of insurance on property, real or personal, exempt from execution or attachment, and the proceeds of the sale of such property.

INVENTORY AND APPRAISEMENT

THE STATE OF MISSISSIPPI,)
DE SOTO COUNTY)

The following is a true, full and perfect Inventory and Appraisement of the Goods, Chattels and Personal Estate of LULA S. TORIAN located in said County, deceased, viz:

SCHEDULE A

Clause 2, Sec. 1654—Inventory and appraisement, goods, chattels and personal estate.

ARTICLES		VALUATION Dollars Cents
Furniture and furnishings located in DeSoto County, Mississippi	(Approx.)	1,000.00
Total	Approx.	1,000.00

SCHEDULE B

Clause 3, Sec. 1654 — List of Exempt Property

ARTICLES	VALUATION Dollars Cents
NOTE:	none
NO STATUTORY ALLOWANCES APPLICABLE BECAUSE LULA S. TORIAN NEVER HAD A CHILD OR CHILDREN AND WAS A FEMALE, THEREFORE NOT SURVIVED BY A WIDOW.	
Total	none

SCHEDULE C

Clause 4, Sec. 1654 — List of articles set apart for one year's provisions and necessary wearing apparel.

ARTICLES	VALUATION Dollars Cents
See above note	none
Total	

SCHEDULE D

Clause 5, Sec. 1654 — Sum of money necessary to pay tuition for the children for one year.

ARTICLES	VALUATION Dollars Cents
	none
See Schedule B	
Total	

REPORT OF APPRAISERS

To the Honorable Chancellor of the Chancery Court of DeSoto County, State of Mississippi:

The undersigned, Appraisers appointed by your Honorable Court, to appraise the Goods, Chattels and personal Estate of Lula B. Sullivan Torian located in the said County of DeSoto, Deceased, beg leave respectfully to report: That, pursuant to and by virtue of the warrant of said Court, to them directed, and their oaths thereon endorsed, which said Warrant and oaths are hereunto annexed, they did on the 4th day of December, 1972, visited the farm of said Deceased, in said County, and that they did then and there value and appraise the Goods, Chattels and Personal Estate of said Deceased, located in said county as far as the same were shown to or discovered by them, or otherwise came to their sight or knowledge, which will fully appear to your honor by reference to the foregoing Schedule, marked "SCHEDULE A", containing each article, with the value thereof attached and extended, amount in the aggregate to approx. ONE THOUSAND & NO/00 DOLLARS, ($1,000.00). That they have set apart to (not applicable) all the Exempt Personal Estate to which (not applicable) is entitled, amounting, as appraised by them which will fully appear by reference to "Schedule B", hereunto annexed. Also for the year's provision and wearing apparel for (not applicable) which will fully appear by reference to "Schedule C", hereunto annexed. Also (not applicable) to pay tuition for one year for children as shown in "Schedule D", hereunto annexed.

All of this hereby certified under our hands, and respectfully subscribed and submitted this 4th day of December, A.D., 1972.

FIRST NATIONAL BANK OF
MEMPHIS, EXECUTOR ESTATE
OF LULA S. TORIAN

By: /s/ Edwin M. Standefer,
Vice President & Trust Officer
Appraisers

We, the Appraisers above named, do hereby certify that we have attended and served one day each, in appraising the Estate of said Deceased.

/s/ Edwin M. Standefer
Appraiser

72-497

APPRAISEMENT

ESTATE OF

Lula B. Sullivan Torian, Deceased

IN THE CHANCERY COURT OF

DeSoto County

First National Bank of Memphis,
Executor of the Estate of Lula S. Torian

APPRAISERS

Filed the 7th day of December, A.D., 1972

H. G. Ferguson, Clerk
By: /s/ E. Miller, D.C.

NOTE—This appraisement to be filed in the Clerk's Office within thirty days from the date of the Letters.

IN THE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI

MRS. LULA S. TORIAN ..... *Testatrix*

VS. NO. 72-497

FIRST NATIONAL BANK OF MEMPHIS ..... *Executor*

PETITION OF EXECUTOR FOR PERMISSION TO WITHDRAW ORIGINAL WILL

TO THE HONORABLE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI:

Comes now First National Bank of Memphis, Memphis, Tennessee, Executor of the estate of Lula S. Torian in the above styled and numbered cause, who would show the following:

1. That the respondents to this Petition are David Sullivan, a minor resident of DeSoto County, Mississippi, without legal guardian, whose mother and natural guardian is Mary Sullivan; Dorothy Hope Sullivan; Robert Lamb Sullivan and Warren Ware Sullivan, all adult residents and citizens of DeSoto County; Louise Crum Smith residing at 5998 Farmington Cove, Southaven, DeSoto County, Mississippi; H. D. Torian, an adult non-resident of the State of Mississippi whose residence, post office and street address is 1929 McAuley Drive, West Memphis, Arkansas 72301, and the following listed adult persons, all non-residents of the State of Mississippi whose residence, post office and street address is given after their names, to-wit:

Ralph Crum, 3270 Prince George Street, Memphis, Tennessee

James Crum, 1045 Mt. Vernon Road, Memphis, Tennessee

Bates Sullivan, Fort Pillow, Tennessee

C. H. Sullivan, Jr., 505 South College Street, Covington, Tennessee

Louise S. Jennings, Route 2, Henning, Tennessee

Virginia S. McDaniels, Flat Iron Road, Covington, Tennessee

Frances S. Rice, Fort Pillow, Tennessee

Mary Charlotte Gibson, 4302 Fredricks, Memphis, Tennessee

2. That the original Will of Lula S. Torian was admitted to probate in this Court on Petition of the Executor. The decedent owned about 920 acres in DeSoto County, Mississippi, and she owned as tenants by the entirety with her husband, H. D. Torian, the residence in West Memphis, Crittenden County, Arkansas described as follows:

Lot 8, Block 10, of Memphis View Subdivision, Crittenden County, Arkansas.

Under the terms of her Will, the real estate in Mississippi was devised to Warren Ware Sullivan, Dorothy Hope Sullivan, Robert Lamb Sullivan, and David Sullivan, who reside in DeSoto County, and Ralph Crum, residing as stated above. The other respondents named as beneficiaries under the terms of the Will of decedent have an interest in this matter.

3. The Executor would show that an authenticated copy of the Will of Lula S. Torian was probated in the Probate Court of Crittenden County, Arkansas in cause number 3556 by the Executor, and the Bank was appointed Executor by the Arkansas Court. However, the Executor is advised there is some question about the validity of the probate of the Will by authenticated copy of a resident of

Arkansas, in that there appears to be no authority for probate of the Will of a resident of Arkansas by copy, but the original Will must be filed in the Arkansas Court.

4. The reasons for requesting the original Will be transferred to Arkansas, are that decedent's Will and Codicil both state she was a resident of Arkansas, that at the time of her death she was married to Mr. Torian, who was and still is a resident of Arkansas, and she died in Arkansas. She and her husband resided on the property described above in West Memphis, Arkansas, to which reference is made in her Will.

5. That Executor believes, in this case, it would be best for the Court to make respondents to this Petition, the parties named above, and direct that process issue to the respondents to show cause, if any they can, why the original Will should not be withdrawn in this cause for the purpose of filing it in the Probate Court of Crittenden County, Arkansas.

WHEREFORE, PREMISES CONSIDERED, the Executor prays that the Court will fix a time certain, in term time or vacation, for the hearing of this Petition, and if process is not waived, will direct process issue to the respondents named in the Petition to appear and plead, answer or demur to this Petition, and on final hearing the Executor prays the Court will authorize the Executor to withdraw the original Will from the Chancery Court of DeSoto County, Mississippi for the purpose of filing same in the Probate Court of Crittenden County, Arkansas, on such terms and conditions as the Court may impose.

Petitioner prays for general relief.

/s/ Joell Walker, Solicitor

STATE OF TENNESSEE
COUNTY OF SHELBY

This day personally appeared before me, the within named authority in and for said County and State, the within named R. P. Blumenthal, Trust Representative, First National Bank of Memphis, who being by me first duly sworn states on his oath that the matters and things contained in the above and foregoing Petition are true and correct as therein stated.

/s/ R. P. Blumenthal,
Trust Representative,
First National Bank of Memphis

Sworn to and subscribed before me, this the 24th day of July, 1973.

/s/ Cindy M. Heazy, Notary Public

My Commission expires:
Mar. 5, 1977

FILED: 26th day of July, 1973
H. G. Ferguson, Clerk
By: /s/ E. Miller, D.C.

IN THE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI

MRS. LULA S. TORIAN ..... *Testatrix*

VS. NO. 72-497

FIRST NATIONAL BANK OF MEMPHIS ..... *Executor*

ANSWER TO PETITION FOR PERMISSION
TO WITHDRAW ORIGINAL WILL

TO THE HONORABLE CHANCERY COURT OF
DE SOTO COUNTY, ARKANSAS:

Come now respondents, Ralph Crum, J. F. Crum, Bates Sullivan, C. H. Sullivan, Jr., Louise S. Jennings, Louise Smith, Virginia S. McDaniel, Frances S. Rice and Mary C. Gibson, and for answer in the above styled cause would state as follows:

1. That respondents named above waive service of process upon them and submit themselves to the jurisdiction of this Honorable Court for the purpose of responding to the petition filed herein.

2. That respondents join in the petition of First National Bank of Memphis, Executor of the Estate of Lula S. Torian, for removal of the original will of the said Lula S. Torian, deceased, to the Probate Court of Crittenden County, Arkansas.

3. That respondents allege that the said Lula S. Torian, deceased, was at the time of her death, and had been for many years prior thereto, domiciled in West Memphis, Arkansas.

4. That respondents believe and therefore allege that the Probate Court of Crittenden County, Arkansas, has jurisdiction over the original probate of the last will and

testament of Lula B. Torian, and that probate in DeSoto County, Mississippi, should be for muniment of title only, the said Lula B. Torian being a domicilary of Arkansas at her death.

WHEREFORE, PREMISES CONSIDERED, respondents pray the Court to authorize the Executor to withdraw the original will from the Chancery Court of DeSoto County, Mississippi, for the purpose of filing same in the Probate Court of Crittenden County, Arkansas, and for such other general relief to which they may be entitled.

/s/ Donald W. Pemberton
Solicitor for Respondents

OF COUNSEL:
BOONE, WELLFORD, CLARK,
LANGSCHMIDT & PEMBERTON
1910 First National Bank Building
Memphis, Tennessee 38103

STATE OF TENNESSEE)
COUNTY OF SHELBY)

This day personally appeared before me, the within named authority in and for said County and State, the within named J. F. Crum, who being by me first duly sworn states on his oath that the matters and things contained in the above and foregoing answer are true and correct as therein stated.

/s/ J. F. Crum

SWORN TO AND SUBSCRIBED before me this 18th day of August, 1973.

/s/ Walter Holman, Jr..
Notary Public

My Commission expires:
December 15, 1976

IN THE CHANCERY COURT OF
DE SOTO COUNTY, MISSISSIPPI

MRS. LULA S. TORIAN ..... *Testatrix*

VS. NO. 72-497

FIRST NATIONAL BANK OF MEMPHIS ..... *Executor*

ANSWER TO PETITION OF EXECUTOR
FOR PERMISSION TO WITHDRAW ORIGINAL WILL,
MOTION TO DISMISS, AND CROSS-BILL
FOR ACCOUNTING AND PAYMENT
OF FEDERAL ESTATE TAXES

COME NOW Dorothy Hope Sullivan, Robert Lamb Sullivan, Warren Ware Sullivan, and Mrs. Mary Sullivan, Individually, and as next friend of David Sullivan, through their attorneys Holcomb, Dunbar, Connell & Merkel, and for answer in the above styled and numbered cause oppose the removal of the original Will of Mrs. Lula S. Torian from the Chancery Court of DeSoto County, Mississippi, and for grounds would show unto the Court the following:

I.

As alleged in both the Petition for Letters Testamentary and the Petition of Executor for Permission To Withdraw Original Will, Mrs. Lula S. Torian owned at the time of her death approximately 920 acres of land in DeSoto County, Mississippi. Consequently, the Order admitting the Will to probate in DeSoto County is proper. Petitioner assumes that Mrs. Torian was a resident of Arkansas at the time of her death, but even if his assumption be accurate, under Section 510 of the Mississippi Code of 1942 as Amended and Annotated and decisions interpreting that section, probate of the original Will of Mrs. Lula S. Torian

in DeSoto County was proper because of the location of her real property in that county. In the Petition for Letters Testamentary, Petitioner alleged the necessity of probate in DeSoto County, Mississippi, because of the real estate located there.

Petitioner assumes that it is necessary to probate the estate of Mrs. Lula S. Torian in Arkansas, but the original Will was properly probated in DeSoto County, Mississippi; and Petitioner offers no reason why the estate must be administered in Arkansas. Although Mrs. Torian's estate was opened in Arkansas by authenticated copy of her Will, Petitioner avers that "there is some question about the validity of the probate of the Will by authenticated copy of a resident of Arkansas, in that there appears to be no authority for probate of the Will of a resident of Arkansas by copy, but the original Will must be filed in the Arkansas Court." The Arkansas statutes provide, however, that a petition for probate or appointment of a personal representative may be made although the will be not in the possession of the petitioner and that the petitioner need only attach a copy of the will to the petition. Sec. 62-2105 and 62-2106 Ark. Stat. Ann.

Both the Arkansas statutes and the Arkansas courts recognize the validity and propriety of probate such as that conducted in Mississippi under Section 510 of the Mississippi Code Annotated. Section 62-2102 of the Arkansas Statutes Annotated provides for original probate of the will of non-residents in the Arkansas county where property of the greatest value is located. The Arkansas Supreme Court has held that probate of the estate of an Arkansas resident in a foreign court under a statute similar to Section 510 of the Mississippi Code Annotated was not subject to attach in Arkansas courts.

II.

According to the Petition for Letters Testamentary, Mrs. Lula S. Torian owned no real estate at the time of her death other than the 920 acres in Mississippi. According to the Petition of the Executor for Permission To Withdraw the Original Will, however, it is alleged that Mrs. Torian owned a home in Arkansas as tenants by the entirety with her husband. That property is, however, a non-probate asset since it passes outside the Will and does not require that Mrs. Lula S. Torian's Will be probated in Arkansas.

There has been no allegation in any petition or pleading that the Arkansas probate estate of Mrs. Lula S. Torian exceeded $3,000.00 exclusive of her homestead. Under Arkansas law an administration of an Arkansas estate of less than $3,000.00 may be dispensed with and the Arkansas estate distributed directly to the distributees after meeting certain specified requirements other than probate. Arkansas Statutes Annotated 62-2127.

Since the location of non-probate real property in Arkansas does not require that Mrs. Lula S. Torian's Will be probated in Arkansas, an Arkansas administration would be unnecessary if Mrs. Torian's personal Arkansas estate did not exceed $3,000.00. Because of her ownership of 920 acres of land in DeSoto County, it was necessary, however, to have her Will probated in DeSoto County, Mississippi, and Section 510 of the Mississippi Code provides the manner in which that Will may be probated. In accordance with the terms of that section, the original Will of Mrs. Lula S. Torian was properly admitted for probate in DeSoto County, Mississippi. An ancillary probate was admitted in Crittenden County, Arkansas, by authenticated copy of Mrs. Torian's Will.

III.

Petitioner seeks in Paragraphs 3 and 4 of his Petition to remove the original Will from the Chancery Court of DeSoto County, Mississippi, for permanent filing thereof in the State of Arkansas. Such a permanent removal is contrary to Section 509 of the Mississippi Code of 1942 as Amended and Annotated, which provides that all original wills, after probate thereof, shall be recorded and remain in the office of the clerk of the court where they were proved, except for permitted temporary absences after which the original will must be returned to the office of the clerk where they were proved. In addition, a removal of the original will to Arkansas is not needed for probate of Mrs. Torian's estate in Arkansas under Arkansas law.

IV.

Petitioner's reasons for requesting the transfer of the original Will as indicated in Paragraph 4 of his Petition are insufficient to establish the necessity of probating Mrs. Torian's estate in the State of Arkansas and are equally insufficient to override the propriety of probate of the Will in Mississippi and the statutory mandate that the original Will remain in DeSoto County, Mississippi.

WHEREFORE, PREMISES CONSIDERED, Respondents move this Honorable Court to dismiss the Petition To Withdraw the Original Will.

And now having answered the Petition herein, Respondents submit the following Cross-Bill.

CROSS-BILL OF COMPLAINT FOR PAYMENT OF FEDERAL ESTATE TAXES

COME NOW Dorothy Hope Sullivan, Robert Lamb Sullivan, Warren Ware Sullivan, and Mrs. Mary Sullivan, Individually, and as next friend of David Sullivan, Respondents and Cross-Complainants in the above styled and numbered cause, through their attorneys Holcomb, Dunbar, Connell & Merkel, and allege the following, to-wit:

I.

Mrs. Lula S. Torian died on October 24, 1972, leaving a Will in which the First National Bank of Memphis was named as Executor and Respondents-Cross-Complainants were named as devisees of certain real property located in the State of Mississippi.

II.

The Executor, First National Bank of Memphis, Tennessee, was duly qualified; the original Will of Mrs. Lula S. Torian was filed for probate in the Chancery Court of DeSoto County, Mississippi, in accordance with Section 510 of the Mississippi Code Annotated; and the Will remains filed in DeSoto County, Mississippi, in accordance with Section 509 of the Mississippi Code Annotated.

III.

The estate of Mrs. Lula S. Torian is of such size as to require the payment of Federal Estate Taxes which became due and payable on July 24, 1973, but said taxes have not been paid by the Executor, although it is believed that ample funds are available in the residuary estate of Mrs. Lula S. Torian to pay said taxes.

IV.

The continued delinquency of the Executor in paying the Federal Estate tax as required places a potential burden

on the Respondents-Cross-Complainants and may unnecessarily encounter the title of Respondents-Cross-Complainants to the real property devised by Mrs. Torian.

WHEREFORE, PREMISES CONSIDERED, Respondents-Cross-Complainants pray this Honorable Court to enjoin the Executor of the estate of Mrs. Lula S. Torian to make an itemized accounting to this Court of the entire estate of Mrs. Torian, to pay the proper Federal Estate taxes on the estate of Mrs. Lula S. Torian immediately and to allocate the burden for the payment of such Federal Estate taxes to legatees or devisees in the manner required by the laws of the State of Mississippi and of the United States.

If Respondents-Cross-Complainants have prayed for improper or inadequate relief, they now pray for such other, further and general relief as may be meet and proper in the premises.

Respectfully submitted,

HOLCOMB, DUNBAR,
CONNELL & MERKEL
By: /s/ Pat D. Holcomb
By: /s/ Edward P. Connell
By: /s/ G. Gregory Boyd

ORDER AFFIRMING DECREE OF CHANCERY COURT OF DE SOTO COUNTY, MISSISSIPPI (SUPREME COURT OF MISSISSIPPI)

This cause having been submitted on the record herein from the Chancery Court of DeSoto County, and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order, adjudge and decree that the decree of said Chancery Court rendered on the 26th day of March, 1974 be and the same is hereby affirmed. Entered the 19th day of November, 1975.